Supreme Court, U.S.
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No. 00-621

In The

Supreme Court of the United States

MICHAEL A. JACKSON,

Petitioner,

vs.

ARTHUR CALDERON, Warden,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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CAPITAL CASE

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Petitioner, Michael A. Jackson, files this Reply Brief to Opposition to Petition for Writ of Certiorari. Because the Opposition to Question One raises only points either dealt with in the Petition or procedural arguments effectively dealt with in the Ninth Circuit's opinion, this Reply is confined to the nine new and specific points raised by respondent with respect to Question Two only. (Opp. at 13-15.)

First, the state cites *Townsend v. Sain*, 376 U.S. 293, 317 (1963), for the proposition that "there is no such thing as a valid free standing claim of 'innocence.' " (Opp. at 13.) But this argument completely overlooks the plurality's holding in *Herrera v. Collins*, 506 U.S. 390 (1993), over thirty years later. It is disingenuous to cite *Townsend* and simply ignore the later decision in *Hererra*.

Second, after first ignoring *Herrera*, the state then considered the case and argued that the *Herrera* right does not exist when there are provisions for executive clemency. (Opp. at 13.) But *Herrera* held no such thing. *Herrera* discussed clemency only as a historical factor in the correction of errors, not as a constitutional safety valve. Indeed, *Herrera* makes clear that its decision would not change even if clemenency were unavailable. 506 U.S. at 414. Given the unpredictable nature of clemency decisions, it is hardly surprising that it cannot be relied upon to protect fundamental rights.

Third, Jackson sought a new trial in both the guilt and death penalty phase under Section 2254 before the district court on the ground, inter alia, that under *Herrera* he was actually innocent of the crime of which he was

convicted in state court and sentenced to death, i.e., first degree murder.

Fourth, the state argues that even if Jackson has an otherwise valid *Herrera* claim, it must be denied because he contends only that he lacked the requisite mental state for first-degree murder, not that someone else committed the crime. (Opp. at 13.) But a criminal defendant is innocent of a crime unless the state establishes each essential element of that crime beyond a reasonable doubt. *See In re Winship*, 432 U.S. 197, 210 (1977); *see also Sawyer v. Whitley*, 505 U.S. 333, 343 (1992) (noting that a showing of actual innocence goes to any of the required elements of the crime). If Jackson lacked the requisite mental state, his innocence is legally indistinguishable from that of a defendant who can show that someone else killed the victim.

Fifth, the state claims that Jackson may be put to death despite the fact that he lacked the mental state required under California law. According to the state, this is permitted because California could have constitutionally passed a capital murder statute similar to the statute in Montana that bars consideration of voluntary intoxication. (Opp. at 13.) It is difficult to know where to begin answering such an argument. Suffice it to say that the state may not execute Jackson based on laws it constitutionally *could have* passed but did not.

Sixth, the state argues that it "seems reasonably possible that the judge might have applied a more lenient standard, perhaps on a provisional basis, in ruling on the neurologist motion." (Opp. at 14.) The district judge articulated a standard in his order. That standard was wrong.

Again, it is disingenuous to say that at other points in the case the judge "might" have been using a different, unarticulated standard, "perhaps on a provisional basis." It simply is not accurate to assert that Jackson should be denied relief because he cannot disprove the state's unfounded conjecture and show what the judge was thinking at every moment of the proceeding. Indeed, even the harmless error standard places the burden to show harmlessness on the prosecution, not the defendant. *See, e.g., O'Neal v. McAninch*, 513 U.S. 432 (1995).

Seventh, the district court considered only two possible standards of proof[1] beyond a reasonable doubt or clear and convincing evidence. However, the issue of standard of proof was then under submission to an *en banc* panel of the Ninth Circuit. That *en banc* panel established the standard of proof as the preponderance of evidence, *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997), *cert. denied*, 523 U.S. 1133 (1998). There is obviously a substantive difference between preponderance of the evidence and clear and convincing evidence on a *Herrera* claim. Whatever "discretion" lies with the district court, the court must rely on the correct standard of proof in exercising that discretion. In a capital case, applying the

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[1] It should be noted that respondent continuously confuses the evidentiary *standard* of proof that must be met with the *burden* of proof in going forward to prove a disputed fact.

incorrect standard of proof can have drastic ramifications.[2]

Eighth, the grave injustice resulting from the inappropriately stringent standard of proof applied by the district court centers on the limitation of evidence relating to the issue of "cognition" and then the refusal to appoint a neurologist.

As set forth in the Narrative Statement of Dr. Aniline, based upon the advances in PCP research since 1983 and personal examinations of Jackson, Dr. Aniline was of the expert opinion that "at the time of the homicide, Michael Jackson was in a pcp-induced amnestic and anesthetized cerebral condition which, to a 95% medical certainty, rendered him physiologically incapable of premeditating deliberating or forming an intent to kill Officer Wrede."[3]

The district court then made the following prejudicial evidentiary rulings when applying the inappropriately stringent standard of clear and convincing evidence:

(a) The erroneous exclusion of *The NMDA Receptor* (Exh. 432), a peer reviewed book published in 1989, which established how PCP interferes with the cognitive process of the brain;

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[2] It should be noted that this Court did not decide in *Herrera* the issue of the standard of proof for a *Herrera* claim and this Court denied certiorari in *Carriger*.

[3] Narrative Statement of Direct Testimony of Orm Aniline, M.D., Ph. D. (Jackson Brief in Opposition, App. A, p. 2.)

(b) The refusal to allow Dr. Aniline to testify concerning the effect of PCP on cognition because Dr. Aniline was not a neurologist;

(c) The exclusion of a chart prepared by Dr. Aniline showing the four sequential cognitive steps with a time line;[4]

(d) The exclusion of excerpts (Exhs. 436, 437) from *Neuropsychological Assessment*, a standard medical text, used by Dr. Aniline to prepare the chart showing the four sequential cognitive steps with a time line (App. A);

(e) Precluding Dr. Aniline from explaining the effect of Jackson's PCP addiction on motoric function (i.e., the killing) as distinguished from cognitive function (i.e., premeditation, deliberation and intent);

(f) Exclusion of testimony and exhibits that illustrated that motoric or lower-level functions can be carried out by a person whose higher-level cognition is inactive, e.g., sleep-walking and sleep violence, including murder;

(g) The refusal of the district court to appoint a neurologist after erroneously limiting Dr. Aniline's testimony on the subject of cognition and excluding supporting exhibits

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[4] The erroneously excluded chart showing the Four Major Sequential Classes of Cognitive Functions (proposed Exhibit 435, attached hereto as Appendix A) also has a time line column added by Dr. Aniline to explain the rapidity of the sequential cognitive steps, ranging from milliseconds, 10-3 to nano seconds, 10-9. This time line was essential for Dr. Aniline to explain how Jackson could have performed the motoric functions he did without formulating the higher cognitive functions of premeditation, deliberation and intent required for first degree murder.

because Dr. Aniline was not a neurologist. Jackson's formal motion for the appointment of a neurologist showed that cognitive function testimony by Dr. Aniline or by a neurologist was indispensable to prove the *Herrera* claim asserted by Jackson (Attached as Appendix B.); and

(h) The refusal to allow Jackson to testify as to his recollection of the events of August 31, 1983, and Jackson's history of PCP use.

Ninth, the district court is now bound by the standard of proof of the preponderance of evidence as set forth in the *Carriger en banc* decision. Since the record is clear that the district court did not use that standard of proof in making its evidentiary rulings and in denying the request for a neurologist, Jackson's *Herrera* claim could only be determined if the Ninth Circuit remanded it to the district court for a full evidentiary hearing under Section 2254, with instructions to apply the *Carriger* standard of proof of the preponderance of the evidence.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

JACKSON V. CALDERON
CV-91-4249 R

THE FOUR MAJOR SEQUENTIAL CLASSES OF COGNITIVE FUNCTIONS

Time Line	Sequential Cognitive Steps
10^{-9} to 10^{-3} seconds*	***Step 1. RECEPTIVE FUNCTIONS***
	↓ • Involve the abilities to acquire, process, classify, and integrate information
10^{-6} to 10^{-3} seconds*	***Step 2. MEMORY AND LEARNING***
	↓ • Means by which information is stored and recalled
10^{-3} seconds*	***Step 3. THINKING***
	↓ • Concerns the mental organization and reorganization of information
	Step 4. EXPRESSIVE FUNCTIONS
	• Means by which information is communicated or acted upon

* 10^{-3} = milli
10^{-6} = micro
10^{-9} = nano

Source: Lezak, M.D. *Neuropsychological Assessment*, Chapter 2: Basic Concepts, pp. 20-35, Oxford University Press (2d ed. 1983).

APPENDIX B

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL JACKSON, Petitioner, vs. ARTHUR CALDERON, Warden of California State Prison at San Quentin, Respondent.	No. CV 91-4249-R **[Death Penalty Case]** I. MOTION FOR AUTHORIZATION TO RETAIN A NEUROLOGIST TO TESTIFY AS TO COGNITIVE FUNCTIONS AND EXHIBITS 432, 433, 434, 435, 436, AND 437; II. MEMORANDUM OF POINTS AND AUTHORITIES; AND III. DECLARATION OF RUSSELL G. WEISS IN SUPPORT THEREOF

) DATE: March 18, 1996
) TIME: 10:00 a.m.
) PLACE: Courtroom 8
)
)

I.

MOTION FOR AUTHORIZATION TO RETAIN A NEUROLOGIST TO TESTIFY AS TO COGNITIVE FUNCTIONS AND EXHIBITS 432, 433, 434, 435, 436, AND 437

TO THE HONORABLE MANUEL L. REAL, JUDGE OF THE UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA:

Petitioner Michael Jackson ("petitioner"), through his attorneys hereby applies for an order authorizing petitioner to retain a neurologist to testify as to cognitive functions and Exhibits 432, 433, 434, 435, 436 and 437. Petitioner is presently making a diligent effort to locate a neurologist even though he has been hampered by lack of funding to retain such an expert. This application is made pursuant to Sections 848(q)(4)(B) and 848(q)(9) of Title 21.

This Motion is based upon the accompanying Memorandum of Points and Authorities, the Declaration of Russell G. Weiss filed concurrently herewith, the pleadings and papers on file in this action, and upon such further argument and evidence as may be presented at the hearing on this application.

DATED: February 23, 1996

LEWIS, D'AMATO, BRISBOIS & BISGAARD LLP
ALLYN O. KREPS
RUSSELL G. WEISS

ROBERT S. DRAPER
O'MELVENY & MYERS

By: /s/ Russell G. Weiss
Russell G. Weiss
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MICHAEL JACKSON

II.

MEMORANDUM OF POINTS AND AUTHORITIES

A. Petitioner Is Entitled To a Neurologist Pursuant To SectionS 848(q)(4)(B) And 848(Q)(9) Of Title 21 Of The United States Code Because A Neurologist Is Needed To Testify As To Cognitive Functions And Exhibits 432, 433, 434, 435, 436, and 437

Pursuant to Section 848(q)(4)(B) of Title 21 of the United States Code, an indigent petitioner who seeks to set aside a death sentence under 28 U.S.C. § 2254 may obtain experts whenever they are reasonably necessary for adequate representation.[1] Section 848(q)(4)(b), which

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[1] Title 21, U.S.C. Section 848(q)(4)(B), states "in any post-conviction proceeding under Section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation for investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8) and (9)."

incorporates Section 848(q)(9), provides that the Court shall authorize funds to capital defendants funds for expert services upon a showing of necessity. *McFarland v. Scott*, ___ U.S. ___, 114 S.Ct. 2568, 2573, ___ L.Ed.2d ___ (1994).

In *Bonin v. Calderon*, 59 F.3d. 815, 837 (9th Cir. 1995) (emphasis added), the Ninth Circuit stated:

> *21 U.S.C. § 848(q)(4)(B) and (q)(9)* ***requires*** *the district court,* upon proper ex parte application, *to provide indigent habeas corpus petitioners seeking to vacate or set aside a death sentence with funds for investigative, expert* or other *services that are "reasonably necessary" for the representation of the petitioner if he is financially unable to obtain them himself.*

In the present case, the Court stated on February 1, 1996 that Orm Aniline, M.D. was not qualified to testify about cognitive functions and to lay a foundation for Exhibits 432, 433, 434, 435, 436, and 437 because Dr. Aniline is not a neurologist. Even though Dr. Alinline had relied upon Exhibit 432 in rendering opinions contained in three previous declarations, the Court did not inform petitioner prior to February 1, 1996 that Dr. Aniline could not rely on such information. In fact, prior to February 1, 1996, petitioner was never aware that he would need to

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Paragraph 9 of Section 848(q): "Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefor under paragraph 10 . . . "

call a neurologist to testify about cognitive functions and to lay a foundation for Exhibits 432, 433, 434, 435, 436, and 437. Testimony about the cognitive functions and the admission of each of these exhibits is necessary to prove the claims asserted by petitioner in his Amended Petition for Writ of Habeas Corpus ("Amended Petition"). Consequently, petitioner moves this Court for authorization to retain a neurologist to testify about the cognitive functions and to lay an adequate foundation for Exhibits 432, 433, 434, 435, 436, and 437.

Exhibit 432 is a book entitled *The NMDA Receptor* published in 1991 and edited by J.C. Watkins and G.L. Collinridge.[2] This book explains that PCP interferes with the NMDA receptor such that the brain is unable to remember and learn new information. Consequently, a person who is grossly intoxicated with PCP is unable to premeditate, deliberate, or maturely and meaningfully reflect upon the gravity of his actions having such actions in mind.

Furthermore, Exhibit 432 helped form the foundation for the medical opinions that Dr. Aniline rendered in his declarations in support of petitioner's;

(1) Motion for Order re: Transportation of Petitioner to University of California, Irvine, College of Medicine, Brain Imaging Center dated September 8, 1995;

(2) Motion for Evidentiary Hearing dated August 8, 1995; and

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[2] Although the Court initially admitted Exhibit 432 into evidence at the evidentiary hearing on January 26, 1996, the Court struck its admission of this exhibit on February 15, 1996.

(3) Ex Parte Application for Order re: Transportation of Petitioner to University of California, Irvine, College of Medicine, Brain Imaging Center dated October 7, 1992.

Exhibit 436 is an excerpt from the second edition of *Neuropsychological Assessment* by Muriel D. Lezak published in 1983. This excerpt explains the relationship between the four major sequential classes of cognitive functions: (1) receptive functions, (2) memory and learning, (3) thinking, and (4) expressive functions. This excerpt states that the cognitive thought process involves receiving information, remembering and learning such information, thinking about and organizing this learned information, and communicating or acting upon such thinking. When a person is unable to perform one of these four classes of cognition, such person's cognitive thought process is grossly impaired.

Like Exhibit 436, Exhibit 437 explains the relationship between the four major sequential classes of cognition. Exhibit 437 which is an excerpt from the third edition of *Neuropsychological Assessment* by Murial D. Lezak published in 1995 is important because it shows that there were no major changes from 1983 to 1985 in the relationship between these classes of cognitive thought. Exhibits 436 and 437 are significant because they help demonstrate, along with the information about the relationship of PCP and NMDA receptors which has been largely discovered since 1984, that petitioner's gross PCP intoxication at the time of the incident prevented petitioner from engaging in the second sequential step of cognition – memory and learning. The neurologist which petitioner is asking the Court to appoint would testify to and

explain these facts and how they relate to this conclusion that petitioner was physiologically unable to premeditate, deliberate, or meaningfully and maturely reflect on the gravity of his actions at the time of the incident.

Exhibit 435 is a chart that summarizes the information concerning cognitive functions contained in Exhibits 436 and 437. Exhibit 435 is significant because a neurologist can use it as a testimonial aid in explaining to the Court how the cognitive thought process works.

Exhibit 433 is an article from the *New York Times* concerning sleep-related violence and that Exhibit 434 is Volume 18, No. 9 of the journal *Sleep* and was published in 1995. This volume of *Sleep* is solely dedicated to case studies concerning sleep-related violence and nocturnal wandering. In particular, several articles contained in Exhibit 434 discuss patients who have engaged in serial activities such a driving an automobile long distances, throwing punches, wielding knives and committing homicide while in an unconscious state of sleep known as noninsane automatism. Upon being awakened from such a state, the patient is amnestic to his actions that transpired while he was asleep.

Non-insane automatism is both significant and relevant to the present case because it shows that an individual can engage in serial activities while in an unconscious state and such individual will be amnestic as to these actions. The only difference between the unconscious states of the individuals in Exhibit 434 and petitioner's unconscious state at the time of the incident is that these individuals were in a state of unconsciousness due to the internal workings of the human mind while petitioner

was in a state of unconsciousness due to gross PCP intoxication.

Petitioner faces a serious dilemma in this action. As set forth in the Offer of Proof of Testimony of Dr. Orm Aniline which is being filed concurrently herewith, petitioner has made clear since at least August 8, 1985 that Dr. Aniline is basing his opinions in this action on the post-1984 knowledge regarding the effect of PCP on the NMDA receptors in the brain and the relationship this bears to petitioner's cognitive functioning on August 31, 1983. (See Aniline Offer of Proof, paragraph 5.) During this entire period there has been no objection from the Court or respondent to Dr. Aniline's qualifications to render these opinions. In fact, when respondent on January 16, 1996 filed his objections to the Narrative Statement of Dr. Aniline's testimony, respondent did not object to the paragraphs in that Narrative Statement which contain Dr. Aniline's testimony regarding cognitive functions, brain physiology, and the relationship between NMDA receptors and PCP (paragraphs 21-27, 56, and 60-61), or object to Dr. Aniline's qualifications to offer those opinions.

The Court has now made clear that it does not believe Dr. Aniline to be qualified in this area and that it rejects all of Dr. Aniline's testimony on these subjects. The court also has made clear that it believes only a neurologist is qualified to testify on these subjects. Since an accurate understanding of how the brain functions and the relationship of PCP and NMDA receptors to the brain's cognitive functions is critical to an understanding of petitioner's position on Claim I, the only remedy open to petitioner is to obtain an order authorizing funds so

that petitioner can find and present the testimony of a neurologist.

Overall, an adequate explanation of cognitive functions, NMDA receptors and PCP, and Exhibits 432, 433, 434, 435, 436, and 437 is necessary to prove Claim I of the amended Petition. Consequently, petitioner respectfully requests that the court authorize petitioner to retain a neurologist.

B. Conclusion

For the reasons stated herein, petitioner respectfully requests that the Court grant this Motion and:

(1) authorize petitioner to retain a neurologist and reopen its case in chief to present the testimony of this neurologist; and

(2) authorize $7,500 to compensate such neurologist at an hourly rate not to exceed $150 per hour for up to $50 [sic] hours of work.

DATED: February 23, 1996

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ALLYN O. KREPS
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By: /s/ Russell G. Weiss
Russell G. Weiss
Attorneys for Petitioner,
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III.

DECLARATION OF RUSSELL G. WEISS

I, RUSSELL G. WEISS, declare that:

1. I am an attorney at law, duly licensed to practice before all the Courts of the State of California and the United States District Court, Central District of California. I am an associate with the law firm of Lewis, D'Amato, Brisbois & Bisgaard, co-counsel for petitioner Michael Jackson. I have personal knowledge of the facts set forth in this Declaration, and could and would testify competently thereto if called as a witness.

2. Exhibits 432, 433, 434, 435, 436, and 437 have been proffered into evidence by petitioner. The Court, however, has not admitted any of these exhibits into evidence.

3. Exhibit 432 is a book entitled *The NMDA Receptor* that was published in 1991 and edited by J.C. Watkins and G.L. Collinridge. Attached hereto and incorporated herein as Exhibit "A" is a true and correct copy of this book.

4. Exhibit 433 is an article from the *New York Times* concerning sleep-related violence. Attached hereto and incorporated herein as Exhibit "B" is a true and correct copy of this article.

5. Exhibit 434 is an article from the journal *Sleep* concerning sleep-related violence. Attached hereto and incorporated herein as Exhibit "C" is a true and correct copy of this article.

6. Exhibit 435 is a chart concerning the four major sequential classes of cognitive functions. Attached hereto and incorporated herein as Exhibit "D" is a true and correct copy of this chart.

7. Exhibit 436 is an excerpt from the second edition of *Neuropsychological Assessment* by Muriel D. Lezak. Attached hereto and incorporated herein as Exhibit "E" is a true and correct copy of this excerpt.

8. Exhibit 437 is an excerpt from the third edition of *Neuropsychological Assessment* by Muriel D. Lezak. Attached hereto and incorporated herein as Exhibit "F" is a true and correct copy of this excerpt.

9. Although the Court initially admitted Exhibit 432 into evidence at the evidentiary hearing on January 26, 1996, the Court struck its admission of this exhibit on February 15, 1996.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed this 23rd day of February, 1996, in Los Angeles, California.

/s/ Russell G. Weiss
RUSSELL G. WEISS